

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS (Boston)

3 No. 1:23-cv-10511-WGY

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5
6 UNITED STATES OF AMERICA, et al,
7 Plaintiffs

8 vs.

9
10 JETBLUE AIRWAYS CORPORATION, et al,
11 Defendants

12 *****

13
14 For Hearing Before:
15 Judge William G. Young

16 Status Conference

17
18 United States District Court
19 District of Massachusetts (Boston)
20 One Courthouse Way
21 Boston, Massachusetts 02210
22 Monday, October 30, 2023

23 *****

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25 Official Court Reporter
United States District Court
One Courthouse Way, Room 5510, Boston, MA 02210
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1 P R O C E E D I N G S

2 (Begins, 2:00 p.m.)

3 THE CLERK: Now hearing Civil Matter 23-10511, the
4 United States of America versus JetBlue, et al.

5 THE COURT: I think for purpose of this -- yes,
6 come up. And as you're coming up, why don't you
7 introduce yourself and who you represent, starting with
8 the plaintiffs.

9 MR. DUFFY: Yes, your Honor. Edward Duffy for the
10 United States on behalf of plaintiffs.

11 MS. MARKEL: Arianna Markel, on behalf of the
12 plaintiffs, for the United States.

13 MR. TEITELBAUM: Aaron Teitelbaum for the
14 plaintiffs as well.

15 THE COURT: Good afternoon.

16 MR. SHORES: Good afternoon, your Honor, Ryan
17 Shores, with Cleary Gottlieb, on behalf of Defendant
18 JetBlue.

19 MR. COHEN: Good afternoon, your Honor, Jay Cohen
20 for the defendant Spirit.

21 THE COURT: Good afternoon.

22 MS. WRIGHT: Elizabeth Wright, from Cooley LLC, on
23 behalf of JetBlue.

24 MS. ZIEMINSKI: Good morning, your Honor, Rachel
25 Mossman Zieminski, from Shearman & Sterling, on behalf

1 of JetBlue.

2 MS. BANSAL: Good morning. Dee Bansal from Cooley
3 LLC, on behalf of JetBlue.

4 MR. FINCH: Good afternoon, your Honor, Andrew
5 Finch for Spirit Airlines.

6 MR. MITCHELL: Good afternoon, your Honor, Michael
7 Mitchell, Shearman & Sterling, for JetBlue.

8 THE COURT: And please be seated. Thank you for
9 attending on this session of the court.

10 I have a half an hour and I'll raise those things,
11 they're just trial management points, but that I would
12 find helpful. I don't think this is the time for
13 argument, but I think we'll have some time for
14 questions. Recognizing that I'm going to stop at 2:30.

15 First, because a number of state Attorneys General
16 who are connected with the case have made calls asking
17 can they participate by zoom and the like, it makes me
18 think that I should order, and now I do --

19 Mr. Duffy, this case was commenced, on the part of
20 the United States government, by the Department of
21 Justice, so I look at you as lead counsel here, and your
22 colleagues. And since we have time limits on this case,
23 which I'm going to enforce, um, I'd like to know who's
24 going to open, if anyone is going to speak in addition
25 to you. As I do in every multi-party case, I take the

1 objection of one as the objection of all, and I take it
2 that as between JetBlue and Spirit, you are joined in
3 the position argued by one, um, without the necessity of
4 two people arguing the position.

5 I also would be helped -- and I don't think it's a
6 burden on you, any of the parties, that when we get to
7 examining witnesses, it would be helpful to me if you --
8 and Mr. Duffy I look to you, if you give me a list of
9 the attorneys who are going to examine a witness and the
10 same thing for the defense. Whether it's cross-
11 examination or direct examination, I like to call people
12 by name, and I will get to know your names, and it will
13 go more smoothly. So if you could indulge me in that
14 fashion.

15 Second, I most recently got this, um, motion
16 jointly for -- to allow, with Court Connect, the, um,
17 transmission of these proceedings back to your law
18 offices.

19 I will tell you, that motion is denied, and it's
20 denied solely on this basis. It happens that I agree
21 completely with the parties' request in this matter and
22 I simply think it is beyond our court's rules, which do
23 have the force of law, um, it's beyond what I can allow
24 under the court's rules even with the most recent
25 iteration through the Court Administration and Case

1 Management Committee of the Judicial Conference of the
2 United States. I just can't authorize this.

3 I'm going to make a suggestion. First of all, I
4 would not authorize it in the breadth that you all seem
5 to want, but I am perfectly amenable, in fact I think it
6 makes good sense, that to authorize this motion, which
7 would add no expense to the court administration of this
8 case and would save the money of the litigants,
9 certainly a desirable outcome, but I would have these
10 limitations. It would only go to the law offices of
11 those who are actually parties, and then only to the law
12 offices, if you're in different law offices, where
13 lawyers who have filed an appearance in this case for
14 the parties in this case, um, actually reside, not
15 experts, not other interested lawyers and the like.

16 And my suggestion is, if I got any sort of
17 authorization from the Judicial Conference, from the
18 Court Administration or the Case Management Committee,
19 from their staffs, or the staff of the Administrative
20 Office, that I could interpret the prohibition on
21 broadcasting to cover the limited Court Connect
22 proposal, I would allow it.

23 Other matters? Let's see. I have again perused
24 the motions pending list and I can rule on a few more.

25 The motions in limine to exclude the anticipated

1 testimony by Sarah Nelson, 171, that's allowed.

2 The motion in limine to exclude testimony from
3 Richard Scheff, that's denied, but I'm very skeptical of
4 Mr. Scheff's, the foundation for his testimony, and
5 we'll see when he goes to testify.

6 All the unopposed motions to seal are allowed and
7 they are Motions 236, 243, 246, 248, 254, 256, 260, 261,
8 279 -- or that's a different motion, I'll speak to it.
9 And 294.

10 279 is a motion for leave to file a brief, amicus
11 curiae, by the Transport Workers, and that motion is
12 allowed and the brief is, um, accepted.

13 One other thing that would be helpful, and I'll
14 stop, because I think we're all ready to go at 9:00
15 tomorrow morning. You have given me the packet of
16 deposition excerpts. It is in every respect
17 satisfactory and I appreciate your putting it together
18 and I have begun to work with it. It would be helpful,
19 and I recognize this is advocacy, but I don't shrink
20 from the advocacy, if I had a list of the order in which
21 you think, from your several positions, I ought be
22 reading these depositions. I've just launched in with
23 Mr. Beck -- I mean Mr. Beck because he is the top of the
24 alphabet. (Laughter.) I mean him no disrespect, but I
25 recognize that starting with him is starting in medias

1 res and, um, that would be helpful.

2 Now really that's everything -- oh, one other
3 thing, and I should be on top of this, and this is a
4 question addressed to JetBlue.

5 You have a motion here to, um, as to the testimony
6 of one of the government's two experts on the ground --
7 don't strike him entirely, but you say there's overlap
8 there. If you would remind me of the -- of what motion
9 that is, I would be helped.

10 MR. SHORES: Yes, your Honor. That is a motion to
11 exclude in part the testimony of Dr. Chipty, who is one
12 of the government's experts, and if the Court would like
13 us to address that, we're happy to do so.

14 THE COURT: I'm sure you are.

15 (Laughter.)

16 THE COURT: I thought that was it. And, um, that
17 motion is allowed with this proviso, or without
18 prejudice. If having allowed that motion the government
19 thinks that something's -- allowed it the way they
20 framed it, any part of the substance of the government's
21 expert presentation is -- now drops between the bar
22 stools, I invite you to point that out to me how it is
23 absent from the, um, testimony of the other expert. But
24 not now.

25 MR. DUFFY: Okay.

1 (Laughter.)

2 MR. DUFFY: And just so I understand the Court's
3 order, as I understand it, the Court is allowing that
4 motion to the extent the testimony is in fact
5 overlapping between Dr. Chipty and --

6 THE COURT: That was my intention. I have to rule
7 on the particular proposal. I'm adopting theirs without
8 prejudice to your pointing out particular experts --
9 particular excerpts, because I want the full testimony.

10 MR. DUFFY: All right, so at the time she
11 testifies. Okay. Understood.

12 THE COURT: Yes, thank you.

13 Well that's really everything I had, and I'm
14 prepared to recess unless there are questions that I can
15 answer.

16 Questions on the part of the United States or --
17 yes, Mr. Duffy.

18 MR. DUFFY: Yes, I would just respond to the
19 Court's question about, um, with respect to openings,
20 that Mr. Matlack from the Massachusetts Office of the
21 Attorney General will be giving a portion of the opening
22 tomorrow, um, and in fact it will be Ms. Markel on
23 behalf of the United States giving the primary portion
24 of it.

25 THE COURT: And, Ms. Markel, you'll go first?

1 MS. MARKEL: Yes, your Honor.

2 THE COURT: All right, openings by Ms. Markel and
3 Mr. Matlack. Fine.

4 MR. SHORES: Yes, your Honor, Ryan Shores. I will
5 be giving part of the opening tomorrow and my colleague
6 from Spirit, Jay Cohen, will be giving part of the
7 opening tomorrow.

8 THE COURT: And I appreciate it. Thank you both.

9 MR. DUFFY: And we understand the Court's position
10 on the objection for one is an objection for all, that's
11 certainly understood and appreciated by us.

12 THE COURT: All right.

13 MR. SHORES: Yes, and of course us as well, your
14 Honor.

15 One thing I would note is, for example, if a
16 third-party is being examined, you know it may be done
17 by a JetBlue counsel, but if Spirit's counsel has a
18 unique issue, um, I would hope they would be able to
19 object on that particular issue.

20 THE COURT: Your refinement is something I should
21 have said. Of course they can. I just want a record
22 that separates that out.

23 MR. SHORES: Of course, your Honor.

24 THE COURT: Otherwise -- of course I want to
25 preserve everyone's rights. Unless -- I think the way

1 to say it is, unless you say "Just on behalf of Spirit"
2 or "Just on behalf of JetBlue," we'll assume, for the
3 purpose of my analysis and also review, that both
4 JetBlue and Spirit have objected or made the argument
5 that's made.

6 MR. SHORES: Yes, your Honor.

7 THE COURT: All right.

8 Anything else?

9 MR. DUFFY: I do have one final question I think,
10 your Honor.

11 With respect to the expert testimony, um, you know
12 frequently in merger cases the plaintiffs will put on
13 their rebuttal case in --

14 THE COURT: Yes, I can see that in this case. I'm
15 not inviting it. But I can see it.

16 MR. DUFFY: Okay, understood.

17 MR. SHORES: May I address that, your Honor?

18 THE COURT: Yes.

19 MR. SHORES: I mean from the defendants'
20 perspective, your Honor's questionnaire says it's rare.
21 There have been multiple depositions in this case.
22 You've already ruled nobody can speak to anything
23 outside the report. So from our perspective there's
24 nothing new under the sun here and there's no reason to
25 have the experts come back on rebuttal in this

1 particular case.

2 THE COURT: Let me -- hearing that I may be
3 opening a can of worms here, um, there's much to what
4 you say and I want this case tried tight and
5 persuasively. The government has a -- and I've read at
6 least the trial briefs and various other things, but the
7 government's got its theory both of market, which you
8 disagree with, but also of violations of the, um,
9 violations of the appropriate statutes. You rebut that
10 and your rebuttal depends on various things to take
11 place in the future.

12 I'm still troubled -- I'm not troubled, because I
13 can understand it, but you'll recall what I've said
14 about sealed matters -- and I've sealed everything that
15 no one really objects to being sealed, and I can
16 understand that, but if they put on a case which would,
17 um, warrant, though not compel relief, you're going to
18 have to go forward and say, "But our plans will obviate
19 these concerns." I recognize I'm talking in a very high
20 degree of generality.

21 I don't see myself deciding anything on the basis
22 of a secret plan. I mean you're going to have to
23 explain to me what the plans are that make it better if
24 I were to allow this to go forward. And I can see them
25 trying to rip up that. That's where my mind is.

1 MR. SHORES: Your Honor, if I may?

2 THE COURT: Yes.

3 MR. SHORES: There's no secrets here at all, um,
4 and they completely disclosed for the government -- our
5 experts have disclosed that, you know they responded to
6 that already, so --

7 THE COURT: So you understand, I'm not clear how
8 this is going to play out. I know that I desire that it
9 play out in open court, if I can comply with the
10 appropriate law on the subject.

11 All right, I've told you what my concerns are.

12 Now I'm not trying to run away, I've got till
13 2:30.

14 Other matters?

15 (Silence.)

16 THE COURT: Very well. Good to see you all.

17 9:00 tomorrow morning, opening statements, and
18 we'll go right on.

19 We'll recess.

20 THE CLERK: All rise.

21 (Ends, 2:15 p.m.)
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C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER,
do hereby certify that the foregoing record is a true
and accurate transcription of my stenographic notes
before Judge William G. Young, on Monday, October 30,
2023, to the best of my skill and ability.

/s/ Richard H. Romanow 10-30-23

RICHARD H. ROMANOW Date